Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Exclusive Service Contracts for Provision of	)	MB Docket No. 07-51
Video Service in Multiple Dwelling Units and	)	
Other Real Estate Developments	)	

REPLY COMMENTS OF SUREWEST COMMUNICATIONS

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TABLE OF CONTENTS

SUMMARY

In addition to the initial Comments filed by SureWest, there was broad support in the record for the Commission's conclusion that exclusive service contracts ("ESCs") act as barriers to competition and to the deployment of advanced services. Arguments to the contrary in the record are fatally flawed, or provide no basis for not enacting a prohibition. Some commenters argue that ESCs give MDU managers leverage to obtain the best possible service for residents, with landlords acting as "proxies" to negotiate on behalf of residents against MVPDs; or argue that ESCs provide great benefits such as bulk rates to residents, and that because community associations are democratically governed, entering into ESCs is an expression of residents' wishes. In response, SureWest notes that ESCs are generally not negotiated by or in favor of MDU residents. The record shows that many ESCs are entered into by real estate developers before the community association is even formed for a particular MDU. In such cases, an ESC is not a democratic expression of the wish of MDU residents, and even where the ESC has been entered into by the community association, the resulting prohibition on choosing one's own MVPD provider is not a democratic choice of a resident who moves into that MDU subsequent to the execution of the ESC. Not surprisingly, the resulting terms of the ESCs often do not provide benefits to MDU residents. While the promise of bulk rates sounds attractive, bulk rates are often part of "take-or-pay" contracts that require residents to pay for service <u>regardless</u> of whether they want service from that provider or not. Such provisions are inherently anti-competitive in that residents forced to take service from an MVPD that is not their preferred provider are nevertheless usually unwilling to pay for additional service from their preferred MVPD, even if they could obtain service from that MVPD.

Some commenters suggest that ESCs promote competition among MVPDs to enter into a contract with the MDU, or that ESCs foster competition by providing assurance to new entrant fiber-to-the-home providers that they will recover their upfront costs, thus providing competition to incumbents. In response, SureWest notes that ESCs, at best, constrain market forces to operate in <u>artificial "windows" of competition of very limited duration</u>. There are two problems with such artificial windows: 1) they exist for very short amounts of time during which only limited benefits can be expected, compared with the typical 10 year or longer terms of the agreements, when competition and consumer choice are barred; and 2) the competitive choice is often made by developers or MDU owners, rather than the resident/subscribers. MVPD selection should be made by <u>MDU residents</u>, not by developers or MDU owners.

The record supports prohibiting MVPDs from entering into new, and from enforcing or renewing existing, ESCs. Some commenters argue that any prohibition should not be applied to current ESCs or renewals thereto, in order not to disturb business expectations of MVPDs and MDU owners who are parties to such ESCs. In response, SureWest notes that as set forth in its initial

Comments, given the fact that ESCs are clearly contrary to the competitive aims of the Communication Act, the Commission must act not only with respect to future contracts, but with respect to existing contracts as well, and it has the legal authority to do so. However, if the Commission wishes to remedy the concerns regarding business expectations in existing ESCs, it could prohibit enforcement only of the exclusivity provisions of existing ESCs, while retaining the remaining provisions for the current term of the contracts. Competing MVPDs could thus provide service to the MDU subject to the ESC, as long as the competing MVPD was willing to "opt-in" to the essential remaining provisions of the ESC, including the financial terms of the ESC, or negotiate a new contract. In this way, any legitimate expectations (the right to provide service to MDU residents, and any cost allocations between MVPD and MDU owner) of the original MVPD party to the ESC are maintained, while expectations that are contrary to the public interest (avoidance of competition) are eliminated. Similarly, any legitimate expectations of the MDU owner (financial recovery for allowing entrance into the MDU, MVPD service requirements to residents) are maintained, and applied to all competitive MVPDs. The Commission could still prohibit renewal of existing ESCs and entering into new or future ESCs, as there are limited or no legitimate expectations in those circumstances. Arguments suggesting that the proposed prohibition would constitute an unconstitutional "taking" are flawed. Prohibiting MVPDs from enforcing or entering into ESCs would not constitute a physical intrusion onto MDU private property. Property owners would not be forbidden from entering into contracts with MVPDs, or from setting reasonable conditions on such MVPDs' access to their private property, or from receiving a share of revenues from such MVPDs. Moreover, the Commission has not proposed that property owners be compelled to enter into agreements with every MVPD desiring to access their property. All that is at issue here is a limited prohibition on contract terms that foreclose even the possibility of a competitive service provider offering services to a particular MDU or property development.

Lastly, the record shows that the Commission has the legal authority to prohibit the establishment and enforcement of ESCs, under numerous provisions of the Communications Act. Some commenters attempt to artificially narrow the purpose and scope of Section 628, suggesting for example that Section 628's sole concern is with contracts for the acquisition of video *programming* by competitive programming providers. However, Section 628, by its terms, is directed at actions that hinder or prevent the provision of programming "*to subscribers or consumers*." If Congress had been solely concerned with the relations between programming vendors and video system operators, it could have narrowly limited the language of Section 628(b) to say so. Instead, Congress was clearly concerned with encouraging the development of competition in the video programming marketplace more broadly, and thus adopted commensurately broad language that prohibited *all* unfair methods of competition or unfair or deceptive acts or practices that hindered the provision of programming to consumers. The legislative history of Section 628 clearly supports this view.

Parties opposing the proposed regulation of ESCs argue at great length that the Commission has no authority to regulate real property owners and any attempt to regulate exclusive contracts between MDU owners and MVPDs therefore is beyond the Commission's authority. Even assuming that these parties are correct in asserting the Commission's limits with respect to real property owners (at least when their activities do not directly implicate concerns within the Commission's purview), the Commission unquestionably has authority to regulate MVPDs and that is precisely what the Commission proposes to regulate – MVPD actions that restrict the ability of other MVPDs to offer competitive services to a significant number of consumers. Specifically, MVPDs would be barred from entering into, or enforcing, ESCs. The fact that a regulatory action directed towards MVPDs may have an incidental effect on real property owners does not transform the proposed Commission action into a regulation of real property owners. For example, the Commission is not regulating lenders when it enforces its long-standing policy prohibiting licensees from granting security interests in Commission licenses. That restriction directly and adversely affects the interests of lending institutions doing business with Commission licensees. Nevertheless, the Commission cannot be said to be regulating financial institutions simply because its regulations on Commission licensees affect the interests of such institutions. As the courts have recognized, where the Commission is regulating a party properly subject to Commission authority, incidental effects on an unregulated party will not abrogate the Commission's authority to regulate.

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SureWest Communications ("SureWest"), by its attorneys, hereby files these Reply Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 07-32, released March 27, 2007, in the above-captioned proceeding ("*NPRM*").

I. The Record Shows That MDU Exclusive Service Contracts Constitute a Barrier to MVPD Competition and to Deployment of Advanced Broadband Networks.

In its initial Comments, SureWest demonstrated that multichannel video exclusive service contracts ("ESCs") are in place in at least 28 percent, and perhaps as high as 59 percent, of the multiple dwelling units ("MDUs") passed by the SureWest network. These MDU exclusive service contracts are a substantial barrier to competition in the multichannel video programming distributor ("MVPD") market, as they completely deny MDU residents the ability to choose their preferred MVPD, and completely bar competing wireline broadband MVPDs from providing service to MDU residents who are locked into taking service from only one such provider. SureWest also showed that its broadband deployment is consistent with the finding recently made by the

Commission in another proceeding that the provision of multichannel video ("MV") services and the deployment of advanced broadband infrastructure are "inextricably linked."[1] As the Commission recognized therein, broadband deployment is expensive, and the risk of investing in wiring an MDU for advanced broadband services may be justified only if the provider has an opportunity to compete for the subscribers' business in video, as well as voice and data services.[2]

A. There Was Broad Support In the Record For the Commission's Conclusion That ESCs Act as Barriers to Competition and to Deployment of Advanced Services.

In addition to the Comments filed by SureWest, there was broad support in the record for the Commission's conclusion that ESCs act as barriers to competition and to the deployment of advanced services:

[1] *See, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as Amended by the Cable Television and Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101 (2007) at para. 51.

[2] As SureWest noted in its initial comments, while it may have been true a few years ago that uncertainty about the ability of a provider to recover the entire cost of serving an MDU from revenues generated by MVPD service alone was a disincentive to investing in wiring an MDU, the ability to generate multiple revenue streams from "double play" or "triple play" offerings (i.e., combinations of bundled video, telephony and broadband Internet access) means that service providers no longer need the guarantee of MVPD exclusivity as an incentive to investment. The fact that a new entrant such as SureWest is ready, willing and able to compete without such guarantees certainly undercuts the notion that such guarantees are necessary. Nevertheless, while new entrants do not require a guarantee of the entire MV service revenue in order to justify investment in broadband facilities in an MDU, good business practice requires that providers have at least an opportunity to compete for and obtain revenue from MV services from a certain percentage of MDU residents. Without that opportunity, the broadband investment often cannot be justified or sustained. Thus, by denying competing providers the opportunity to recover at least some of their costs from MV service revenues, exclusive contracts are a barrier to the deployment of broadband networks, not an enhancement to such deployment. *See also,* Comments of AT&T at note 41 (cable incumbents do not need ESCs to recoup investment in existing MDU facilities).

AT&T: AT&T described (Comments at pages 8-15) the broad use and anti-competitive impact of ESCs, not only in its own service areas, but in others as well. With respect to its own service areas, it reported that in selected areas of Florida alone, residents in over 22,000 units are precluded by ESCs from selecting among competing MVPDs. AT&T demonstrated that efforts by incumbent cable operators to lock up MDU subscribers in a market increased notably as AT&T prepared to enter that market. AT&T also demonstrated that the exclusivity provisions of ESCs are often hidden in "fine print" and that many ESCs have "evergreen" provisions that provide for automatic renewals after the initial term expires, thus locking MDU residents out of the benefits of competition for extensive periods of time.

Verizon: The Comments of Verizon (pages 8-13 and Attachments 2-9) also made an extensive showing regarding the breadth and anti-competitive impact of the use of ESCs. Verizon noted (Comments at page 7) that ESCs are analogous to exclusive cable franchises, which federal policy recognizes as fundamentally anti-competitive.[3] Verizon also stated (Comments at pages 7-8) that because ESCs often cover data and voice services as well as MV, they can undercut the economic basis for competitors to deploy facilities that offer competitive advanced services.

US Telecom: The Comments of the United States Telecom Association ("US Telecom") (pages 2-5, 7-8) note that traditional cable operators remain the dominant provider of MVPD service, especially in MDUs, where many residents cannot obtain DBS service due to lack of line-of-sight access to satellites. US Telecom also demonstrated (pages 12-13) that incumbent cable operators only lower their prices in the face of wireline competition, not competition from DBS. Lastly, US Telecom showed (pages 9-11) that the opportunity to offer MV services is critical to broadband deployment by increasing the chances of cost recovery, and reducing the risk for new competitive providers.

Embarq: Embarq noted (Comments at page 3) that with increasing bundling of services, any contract limiting deployment of MV service will adversely impact broadband deployment. Embarq also demonstrated (pages 6-8) that this issue is particularly problematic when the competitive MVPD provider has carrier-of-last-resort voice service obligations in an MDU subject to an MV ESC with another provider, and thus has difficulty recovering the costs of implementing an advanced network solely through voice service revenues.

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[3] *See* Section 621(a)(1) of the Communications Act, which provides in part that a franchise authority "may not unreasonably refuse to award an additional competitive franchise." Verizon is not the first party to make this analogy: in arguing for limitations on MDU ESCs in a previous proceeding, cable MSO Cox Communications apparently made the same analogy to the Commission. *See, Cable Home Wiring Report and Order,* 13 FCC Rcd 3659, 3749 and note 536 (1997), citing to comments filed by Cox Communications.

Qwest: Qwest noted that market forces are not sufficient at this time to promote MVPD competition in MDUs, and that accordingly the Commission should regulate ESCs. (Comments at page 3) Qwest also stated (page 2) that MVPD revenues are "driving wireline broadband deployment" and that action in this proceeding is a "critical step towards ensuring that [the benefits of broadband] become available to the millions of multichannel video subscribers who live in MDUs."

Support in the initial comments for a prohibition on ESCs was not limited to the comments of telephone company MVPDs. The City of Lafayette Utilities provided an extensive description of various sorts of ESCs, and how they constitute barriers to entry. Comments at pages 4-8. The Comments of Corning Inc. (pages 6-7) noted the high cost to deploy fiber-to-the premises ("FTTP") facilities, and that ESCs inhibit FTTP deployment to MDUs, which are underserved by FTTP.

In sum, there was substantial support in the record for the Commission's tentative conclusions that ESCs constitute significant barriers to competition and to deployment of advanced services. As shown below, arguments to the contrary in the record are fatally flawed, or provide no basis for not enacting a prohibition.

B. ESCs Generally Are Not Negotiated by or in Favor of MDU Residents.

The Independent Multifamily Communications Council ["IMCC"] argues that ESCs give MDU managers leverage to obtain the best possible service for residents, with landlords acting as "proxies" to negotiate on behalf of residents against MVPDs (Comments at pages 4-5, 21). The Community Associations Institute ["CAI"] asserts that ESCs provide great benefits such as bulk rates to residents, and that because community associations are democratically governed, entering into ESCs is an expression of residents' wishes and thus is in the public interest (Comments at pages 2-5).

In response, SureWest notes that MDU residents often do not have a say in the negotiation of ESCs. The record shows that many ESCs are entered into by real estate developers before the community association is even formed for a particular MDU.[4] In such cases, an ESC is not a democratic expression of the wish of MDU residents, and even where the ESC has been entered into by the community association, the resulting prohibition on choosing one's own MVPD provider is not a democratic choice of a resident who moves into that MDU subsequent to the execution of the ESC. Not surprisingly, the resulting terms of the ESCs often do not provide benefits to MDU residents. While the promise of bulk rates sounds attractive, bulk rates are often part of "take-or-pay" contracts that require residents to pay for service <u>regardless</u> of whether they want service from that provider or not. See Comments of City of Lafayette Utilities at pages 4-5. Such bulk rate provisions are inherently anti-competitive in that residents forced to take service from an MVPD that is not their preferred provider are nevertheless usually unwilling to pay for service from a second MVPD (their preferred provider), even if they could obtain service from that MVPD.[5] As a

[4] *See, e.g.,* Verizon Comments at note 5 and associated text.

[5] CAI also suggests at page 5 of its Comments that ESCs serve the public interest because they often contain contractual requirements for maintenance and upgrade that would not be provided by an MVPD serving an MDU without an ESC. However, as discussed by AT&T in note 41 of its Comments, ESCs lead to <u>reduced</u> incentives to investing in maintenance and upgrade of MDU facilities once the ESC is implemented, because at that point the selected MVPD has, in effect, monopoly control over service provided to the MDU and therefore no incentive to invest further in additional facilities to remain competitive.

result, these MDU residents cannot take advantage of lower prices and/or new services offered by competitive MVPDs.

C. ESCs Do Not Promote Competition.

CAI suggests that ESCs promote competition among MVPDs to enter into a contract with the MDU (Comments of CAI at pages 5-7). In response, SureWest notes that ESCs, at best, constrain market forces to operate in artificial "windows" of competition of very limited duration. There are two problems with such artificial windows: 1) they exist for very short amounts of time during which only limited benefits can be expected, compared with the typical 10 year or longer terms of the agreements, when competition and consumer choice are barred; and 2) the competitive choice is often made by developers or MDU owners, rather than the resident/subscribers. MVPD selection should be made by MDU residents, not by developers or MDU owners. *See* Comments of Embarq at page 5. There is no evidence that such artificial windows of competition provide benefits to residents who must pay for the MVPD service, as opposed to developers and MDU owners who are not paying for the service. Rather, the "competition" if it exists, is to provide benefits to the developer or MDU owner.

Greenfield Service Providers assert (Comments at pages 6-8) that ESCs foster competition by providing assurance to new entrant fiber-to-the-home providers that they will recover their upfront costs, thus providing competition to incumbents. In response, SureWest notes that this is yet another argument for only a "window" of competition which, upon implementation of the ESC, is typically cut off for 10 year or more. This process doesn't provide competition to an incumbent; it just anoints a solitary new incumbent instead. Competition cannot rationally or properly be promoted through ESCs designed to guarantee the success of a particular competitor. The purpose of federal policies in favor of competition is not to "guarantee" the success of certain competitors, but rather to promote competition generally, for the benefit of consumers.[6]

IMCC states that it is extremely expensive for small private cable operators to wire MDUs, compared with lower costs for cable MSOs and telephone companies to do the same. IMCC argues that ESCs thus appropriately protect small private cable operators against price wars with larger operators, who can allegedly cross-subsidize their costs and who allegedly receive volume discounts on programming (Comments at pages 8, 10-11). SureWest notes in response that this argument concedes that it is more efficient for cable MSOs or telephone companies to serve MDUs. This is not necessarily true. If it is untrue, consumers lose when it is the cable MSO who holds the ESC to their MDU

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[6] *Cf., In the Matter of GTE Sprint Communications Corporation, US Telecom, Inc., Allnet Communications Services, Inc., and United States Transmission Systems, Inc., Notice of Proposed Rulemaking,* FCC 85-604 (released December 5, 1985), 1985 FCC LEXIS 2207 ("…we do not confuse the needs of competitors with our responsibilities to promote competition. A strategy of trying to guarantee the success of all industry participants without regard to their relative efficiency or the economic costs consumers are forced to bear, besides being harmful to consumers, runs the risk of creating the appearance of competition without the reality. Handicapping doesn't benefit consumers – competition does.") (Separate Statement of Chairman Mark Fowler). *See also*, Speech of Chairman Reed Hundt, October 23, 1996, 1996 FCC LEXIS 6049, ("In Spain the new Government has declared that it will create a duopoly for two years so that the new competitor can succeed. This is a classic example of the fallacy of confusing the welfare of a competitor with the promotion of competition and economic efficiency.")

development. And assuming arguendo that it is true, then MDU residents should be allowed to benefit from these efficiency savings, which would be passed along to them in a competitive market. The Commission cannot rationally promote competition by allowing the use of ESCs to "protect" certain MPVDs from price competition. This flies in the face of the Commission's pro-competitive, pro-consumer policies.

D. Other Arguments Made in Support of ESCs Provide No Basis for Rejection of the Proposed Ban on Enforcement of ESCs.

Shenandoah Telecommunications Company asserts that ESCs allow MVPDs to serve remote and rural developments where incumbents will not go due to distance and lack of density (Comments at pages 12-14). In response, SureWest notes that if no one else is serving these residents, it would seem that an MVPD could gain a large enough market share of triple-play revenues from those residents to justify the initial network expenses, without needing to resort to an ESC. At very least the incumbent local exchange carrier serving such residents should be able to use its existing network to provide cost-efficient MVPD service to them.[7]

The American Cable Association argues that MDU owners force MVPDs to bear the cost of wiring MDUs, to make up-front payments, and to share subscriber revenues, so MVPDs must be able to recover these costs through

[7] Shenandoah Telecommunications Company ("ShenTel") also argues (Comments at pages 14-16) that ESCs are the only way to efficiently serve time-share residences and MDUs in college towns, due to high turn-over and the limited amount of time that any resident is occupying a particular unit. If the Commission agrees with this assertion, it could acknowledge that MVPDs could seek a waiver of the ESC enforcement prohibition in such circumstances, which are very small in number, compared to the total number of MDUs.

ESCs (Comments of at page 3). In response, SureWest notes that the proposed prohibition on enforcement of ESCs would appropriately "tie the (MVPD) victim's hands" so that MVPDs would be prohibited from complying with unreasonable MDU owner demands, and thus service would be provided to residents without the added costs of paying off MDU owners.[8]

In sum, the record shows that MDU ESCs constitute a barrier to MVPD competition, to consumer choice, and to deployment of advanced broadband networks. Arguments to the contrary in the record are fatally flawed, or provide no basis for not enacting a prohibition.

II. The Record Supports Prohibiting MVPDs From Entering into New, and Enforcing Existing, MDU Exclusive Service Contracts.

The record demonstrates that the enforcement of exclusive service contracts negatively impacts MVPD competition generally, and specifically in the MDUs subject to such contracts. This state of affairs is contrary to the pro-competitive policies of the Communications Act and the Commission. Federal policies designed to promote competition in the MVPD market require the Commission to prohibit enforcement of ESCs. In addition to prohibiting MVPDs

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[8] *Cf.*, *Comment, Tying the Victim's Hands: Curbing Citizen Group Abuse of the Broadcast Licensing Process*, 39 Fed. Comm. L.J. 259, 281-295 (1987) (discussing proposals to curb "extortion" of broadcast licensees by prohibiting licensees from making settlement payments to citizens groups that file petitions to deny broadcast license applications). *See also*, Section 73.3588 of the Commission's rules, limiting payments made to parties in return for withdrawing or dismissing their petition to deny a license application. In an argument similar to that made the American Cable Association, Charter Communications Inc. notes (pages 2-4) that ESCs exist largely because property owners wish to leverage their rights to extract money from MVPDs. SureWest agrees that this incentive for MDU owners or developers is a factor, but the result still constitutes a barrier to competitive entry, even in cases where the barrier is initially generated by the MDU owner rather than the incumbent cable MSO.

from enforcing *existing* exclusive service contracts, the Commission should prohibit MVPDs from entering into *new* agreements. SureWest believes that if MVPDs are allowed to enter into new ESCs, even if the MVPD cannot enforce such contracts, the owner of the MDU may not understand that the contract is not enforceable, and as a result, may inadvertently discourage competitors from offering service to the residents of that MDU.

Charter Communications (Comments at pages 4-6) and the National Cable & Telecommunications Association ("NCTA") (Comments at pages 8-11) suggest that any rules on MDU ESCs should apply to all MVPDs equally. SureWest agrees with that principle. The anti-competitive effect of ESCs is the same regardless of whether the contract is held by an incumbent MVPD or a new entrant -- in either case the MDU residents are "captives" who are denied the benefits of competition on price and services. Competition and deployment of advanced services cannot be fully promoted if MDU residents are locked into taking service from only one provider – regardless of whether that provider is an incumbent MSO or a competitive MVPD.

Verizon (Comments at pages 13-15) proposes that a prohibition on the enforcement of ESCs should last <u>only</u> for a "window" of five years. SureWest opposes that proposal. Federal policy requires, and consumers deserve, the ability to choose their preferred MVPD on an <u>on-going basis</u>, not just for a short and limited period of time. Some commenters urge the FCC not to ban most ESCs, but nevertheless suggest that perpetual contracts should be banned (Comments of Hotwire at pages 7-8). But the anti-competitive lack of consumer choice that results from perpetual contracts is largely duplicated in ESCs with 5-15 year terms, and thus the basis for banning perpetual contracts also requires the banning of non-perpetual ESCs.

ShenTel argues (Comments at page 4) that any prohibition should not be applied to current ESCs or renewals thereto, in order not to disturb legitimate business expectations of MVPDs and MDU owners or managers who are parties to such ESCs. Similarly, NCTA (Comments at pages 11-14) states that existing contracts should not be abrogated, and alleges that doing so would have an adverse impact on investment interests of the MVPD and MDU parties to such ESCs. In response, SureWest notes that as set forth in its initial Comments, given the fact that ESCs are clearly contrary to the competitive aims of the Communication Act and the 1996 Telecommunications Act, the Commission must act not only with respect to future contracts, but with respect to existing contracts as well. In *Western Union Telegraph Co. v. FCC*, U.S. Court of Appeals for the D.C. Circuit noted that the Commission has the power to modify provisions of private contracts when necessary to serve the public interest."[9] However, SureWest recognizes that a distinction can be made between a prohibition on enforcement of existing ESCs on the one hand, and on the other hand a prohibition on entering into new or future ESCs. In the case of the

[9] *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495,1501(D.C. Cir. 1987) (*citing FPC v. Sierra Pacific Power Co*., 350 U.S. 348, 353-355 (1956); *United Gas Co. v. Mobile Gas Corp.,* 350 U.S. 332, 344 (1956).). *See also, IDB Mobile Communications, Inc. v. COMSAT Corporation*, 16 FCC Rcd 11474, ¶14 (2001), wherein the Commission stated that it may modify provisions of a private contract when the contract's terms "adversely affect the public interest," though it chose not to do so in that particular case.

former, some expectations have been created (whether legitimate or not) and in some MDUs, cost recovery for network installations may not have been recovered yet. Thus, if the Commission wishes to remedy these concerns, it could consider the following:

> -*Prohibit enforcement only of the exclusivity provisions of existing ESCs, while retaining the remaining provisions for the current term of the contracts*. Competing MVPDs could thus provide service to the MDU subject to the ESC, as long as the competing MVPD was willing to "opt-in" to the essential remaining provisions of the ESC, including the financial terms of the ESC,[10] or negotiate a new contract. In this way, any legitimate expectations (the right to provide service to MDU residents, and any cost allocations between MVPD and MDU owner) of the original MVPD party to the ESC are maintained, while expectations that are contrary to the public interest (avoidance of competition) are eliminated. Similarly, any legitimate expectations of the MDU owner (financial recovery for allowing entrance into the MDU, MVPD service requirements to residents) are maintained, and applied to all competitive MVPDs.
>
> -*Prohibit enforcement of renewals of existing ESCs*: there is not the same level of expectation that the ESC will be in operation after the initial term as there is during the original term, unless the renewal provisions are in essence "automatic." In such cases, the result is a form of perpetual ESC, which even advocates of ESCs recognize as contrary to the public interest. Furthermore, while some parties claim that an ESC is necessary to recover the costs of installing a network in an MDU, no party has asserted, much less demonstrated, that renewals of such contracts after a typical term of 5 to 15 years is necessary to recover costs.
>
> -*Prohibit enforcement of all new or future ESCs*: There is no legitimate expectation that parties should be able to enter into new ESCs, now or in the future. There is no certainty that particular MVPDs and MDU owners would come to mutually agreeable terms in specific future contracts, and in any case, the regulatory environment in the MVPD and MDU businesses changes all of the time, regularly impacting business operations and expectations. Similarly, there are no legitimate current un-recovered investments where an MVPD has not yet entered into an ESC regarding a particular MDU, and thus not constructed network facilities in that MDU.

[10] Other essential terms for opt-in would include those addressing safety, service requirements, construction, compliance with law, and coordination with other utilities.

In sum, the record supports prohibiting MVPDs from entering into new ESCs (now or in the future), and prohibiting MVPDs from enforcing existing ESCs and renewals thereto. While the Commission has the authority to prohibit enforcement of existing ESCs, if it believes that the public interest would best be served by addressing concerns regarding expectations associated with existing ESCs, it could prohibit enforcement only of the exclusivity provisions of existing contracts, while retaining the remaining provisions for the current term of the contracts, and allow competing MVPDs to opt-into those provisions for the remainder of the current term of the ESC, or negotiate a new contract.

III. The Record Shows that the Commission Has the Authority to Prohibit the Establishment and Enforcement of Exclusive Service Contracts.

As fully described in SureWest's Comments and the comments filed by several other parties, including AT&T Inc. and Verizon, the Commission has broad authority to prohibit the use of exclusive contracts for the provision of video services to MDUs or other real estate developments.[11] The Commission's authority is securely grounded in several provisions of the Communications Act of 1934, as amended (the "Communications Act"), and the Telecommunications Act of 1996 (the "1996 Telecom Act").

As noted in SureWest's Comments, Section 601 of the Communications Act makes it a fundamental purpose of the Act "to promote competition in cable communications."[12] Section 623 of the Communications Act requires the

[11] *See, e.g.*, Comments of SureWest Communications at pages 12-28, Comments of AT&T Inc. at pages 15-24, Comments of Verizon at pages 15-19.

[12] *See* SureWest Comments at pages 17-20 (*citing* 47 U.S.C. §521(6)).

Commission to ensure reasonable rates for basic cable services, while Section 628(a) of the Communications Act and Section 706 of the 1996 Telecom Act require the Commission to encourage the development and deployment of new services.[13] In addition, Section 628 prohibits "unfair methods of competition or unfair or deceptive acts or practices."[14] These provisions, in conjunction with Sections 1, 4(i) and 303(r) of the Communications Act, provide a mandate for Commission action in this proceeding.

Certain commenters in this proceeding, however, made various claims that these sources of authority do not support Commission action in this proceeding. While many of these claims are specifically addressed below, the essential claim of many of these commenters is that the Communications Act does not explicitly grant the Commission authority over exclusive contracts or MDUs, and thus any action by the Commission that affects exclusive contracts or the business interests of MDU owners is beyond the Commission's limited authority.[15] As demonstrated by SureWest and others, however, the protection and promotion of competition in MVPD services, the promotion of advanced services at reasonable rates, and the protection of the public interest are *fundamental* to the Commission's statutory mandates. Exclusive contracts are explicitly anti-competitive. Such contracts, while clearly benefiting the parties to

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13 SureWest Comments at pages 20-22 (*citing* 47 U.S.C. §543; 47 U.S.C. §548(a); 47 U.S.C. §157(a)).

14 SureWest Comments at pages 22-27 (*citing* 47 U.S.C. §548(b)).

15 *See, e.g.*, Comments of the Real Access Alliance ("RAA Comments"), Comments of Time Warner Cable ("Time Warner Comments"), Comments of Comcast Corporation ("Comcast Comments"), Comments of NCTA .

the contracts, harm the public by eliminating the possibility of competition for affected MDU residents and, consequently, denying them the clear benefits of competition (*i.e.,* improved services and/or lower prices). As such, the Commission does not merely have the authority to regulate such contracts, it has the obligation to do so.

A. Section 628 Supports Commission Action in this Proceeding.

As the Commission noted in the *NPRM*, Section 628(b) specifically prohibits "unfair methods of competition or unfair or deceptive acts or practices," stating:

> [i]t shall be unlawful for a cable operator, a satellite, cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[16]

Real Access Alliance ("RAA") and other commenters make several claims about the intent and meaning of Section 628 in an attempt to artificially narrow the purpose and scope of Section 628. RAA, for instance, claims that "Section 628's sole concern is with contracts for the acquisition of video *programming* by competitive programming providers."[17] As Verizon very ably describes in its Comments, however, Section 628, by its terms, is directed at actions that hinder or prevent the provision of programming "*to subscribers or consumers*."[18] If

[16] 47 U.S.C. § 548(b).

[17] RAA Comments at page 30 (emphasis in original).

[18] *See* Verizon Comments at pages 15-18.

Congress had been solely concerned with the relations between programming vendors and video system operators, it could have narrowly limited the language of Section 628(b) to the relations between programming vendors and video system operators. Instead, Congress was clearly concerned with encouraging the development of competition in the video programming marketplace more broadly, and thus adopted commensurately broad language that prohibited *all* unfair methods of competition or unfair or deceptive acts or practices that hindered the provision of programming to consumers.[19]

The legislative history of Section 628 clearly supports this view. For instance, the related Senate bill under consideration in 1992 was far more akin to RAA's reading of Section 628. The Senate version would have barred national and regional cable programmers who are affiliated with cable operators only from (1) unreasonably refusing to deal with any multichannel video programming distributor; and (2) discriminating in the price, terms, and conditions in the sale of their programming to multichannel video distributors if such action would impede retail competition.[20] Ultimately, however, Congress adopted the much broader House version of the bill, which provided for the much more comprehensive prohibition against "unfair methods of competition or unfair or deceptive acts or practices."[21] This shift clearly signals the Congress' intent that Section 628 is to

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[19] *Id.*

[20] *See* Conference Report on S. 12, Cable Television Consumer Protection And Competition Act of 1992, H. Rept. 102-862, 138 Cong Rec H 8308, 8332 (1992).

[21] *Id*.

apply to issues broader than just the specific dealings between programmers and program distributors, as advocated by RAA and others.[22]

In addition, the legislative history clearly signals that Congress intended the Commission to have the authority and to affirmatively address broader issues of competition in adopting Section 628. Indeed, the Conference Report specifically states:

> In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, *including* restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which *promote the development of new technologies providing facilities-based competition to cable* and extending programming to areas not served by cable.[23]

The narrow reading of Section 628 advocated by RAA and other commenters is directly contrary to the intent of Congress. The legislative history shows that while restrictions in the offering of cable programming were "included" among the unreasonable cable practices to be addressed by the Commission, the use of the word "including" explicitly shows that Congress did not intend Commission remedies to be limited to program access. Moreover, the Conference Report unambiguously states that it was the intent of Congress that the Commission, in

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[22] Certain commenters, including Comcast and NCTA, note that in deliberating the Cable Communications Policy Act of 1984, Congress considered and rejected a provision that would have guaranteed all cable operators' access to MDUs. *See* Comcast Comments at page 25; NCTA Comments at note 3. In response, SureWest simply notes that there is no inherent conflict between the Congressional decision not to adopt a narrow provision in 1984 and its decision to adopt a broad provision eight years later. Indeed, the Commission should take more instruction from Congressional action than inaction.

[23] Conf. Rept., 138 Cong. Rec. H at 8332 (emphasis added).

exercising authority under Section 628, "promote the development of new technologies providing facilities-based competition to cable." New technologies such as SureWest's fiber network, Verizon's FiOS services, and AT&T's U-Verse are exactly the sort of new facilities-based video programming and broadband competition envisioned by Congress. As ESCs plainly hinder such facilities-based competition by locking out facilities-based competitors, Section 628 directly supports the Commission's proposed action, one that can be achieved through the focused elimination of such exclusive contracts with a narrowly-targeted order.

Nevertheless, RAA and other commenters complain that Section 628 cannot empower the Commission to act against MDU owners or exclusive contracts for MDUs because Section 628 does not explicitly address MDUs or access to buildings or other physical property.[24] Neither the Commission nor, to SureWest's knowledge, any commenter, has claimed that Section 628 contains an explicit prohibition against exclusive contracts between MVPDs and MDU owners. Section 628, however, does contain an explicit prohibition against "unfair methods of competition or unfair or deceptive acts or practices," which, as demonstrated in the comments of SureWest and other commenters, includes the ESCs at issue. Moreover, as further discussed below, the Commission <u>is not proposing to regulate MDUs or MDU owners</u>. Rather, the FCC is proposing to regulate the <u>unfair practice of MVPDs</u> using ESCs to prohibit competition in the

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[24] *See, e.g.*, RAA Comments at page 30.

provision of video programming to MDU residents --- a proposal supported by the plain language of Section 628.

Section 628's prohibition on "unfair methods of competition or unfair or deceptive acts or practices" is an expansive prohibition, not limited to specific enumerated practices. That is, the regulations required under Section 628(c) are not, as suggested by RAA and others, the exclusive actions permitted or intended by Congress. Section 628(c), on its face, describes the "minimum contents" of such regulations, clearly indicating that the regulations described are a floor, not a ceiling, for FCC action. Thus, the plain text of Section 628, along with its legislative history, reveals a broad concern about anti-competitive behavior that harms consumers by hindering MVPDs from providing service to consumers. [25]

In the *NPRM*, the Commission invited comparisons of Section 628 and Section Five of the FTC Act, prompting lengthy complaints from Comcast, RAA and others that the FTC Act is not applicable to the matter at hand.[26] Such complaints, however, are missing the point. The Commission never asserted that it somehow has authority to act under Section Five of the FTC Act, nor did the *NPRM* assert that Section 628 was a "mini-Sherman Act." The *NPRM* merely suggests that several decades' worth of enforcement of a facially similar statute

[25] This is further bolstered by the longstanding core provisions of Section 4(i) of the Act, which provide the Commission with fundamental authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions." *See also* Sections 1 and 303(r) of the Communications Act.

[26] Comcast Comments at pages 28-29; RAA Comments at page 35.

may be instructive in considering the scope of Section 628's prohibition on "unfair methods of competition or unfair or deceptive acts or practices." This is a perfectly appropriate suggestion and, as illustrated in SureWest's initial Comments, a useful one.[27]

In one case involving Section Five of the FTC Act, the United States Supreme Court upheld an FTC finding that an exclusive contract "which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition.'"[28] In another case, the Seventh Circuit held that only "some showing of a lessening of competition" is required to support the conclusion that an exclusive contract is an "unfair method of competition."[29] These cases, at the very least, provide a useful comparison to the exclusive contracts under review in this proceeding. To the extent that such contracts lessen competition generally while benefiting a relative few, the Commission can and should rationally deem them to be an "unfair method of competition" under Section 628 of the Communications Act.

B. Section 623 Provides Broad Support for Commission Action.

As detailed in the SureWest Comments, the Commission's authority to enact regulations prohibiting enforcement of exclusive contracts also is well grounded in Section 623. Section 623 directs the FCC to ensure "reasonable

[27] *See* SureWest Comments at pages 24-27.

[28] *FTC v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394-395 (1953).

[29] *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 21 (1971).

rates" and clearly expresses a preference for competition.[30] Indeed, the Commission has recognized that fostering competition among service providers is a fundamental means to ensure that cable service rates remain "reasonable."[31] Thus, as previously demonstrated by SureWest and other commenters, the prohibition on enforcement of exclusive contracts is an appropriate, even preferable, way of ensuring that cable service rates remain reasonable in accordance with Section 623 because allowing alternative service providers to compete for MDU consumers will inevitably act to contain rates for such consumers at a reasonable level.

Despite this straightforward reasoning, some commenters dispute that Section 623 provides the authority for Commission action in this matter. The arguments of these commenters, however, are unpersuasive. NCTA, for instance, claims that Section 623(b)(2) specifically describes the types of regulation that Congress deemed integral and necessary to the implementation of the FCC's responsibilities under Section 623 "and affirmatively promoting competition through regulation is not one of them."[32] NCTA is simply wrong. Nowhere does Section 623(b)(2) expressly limit the FCC's regulatory options. Nor does Section 623(b)(2) indicate that the FCC may not regulate to promote

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30 *See* SureWest Comments at page 20, citing 47 U.S.C. §543.

31 *See, e.g., In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring, Report and Order and Second Notice of Proposed Rulemaking*, 13 FCC Rcd 3659, 3704, ¶ 89 (1997) ("*Inside Wiring Order*") ("In the 1992 Cable Act, Congress specifically embraced a "preference for competition" over regulation in setting rates for cable services.").

32 NCTA Comments at page 7.

competition as a means of ensuring rates are reasonable. Rather, Section 623(b)(2) states, in relevant part, "the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph 1."[33] Section 623(b)(2) further directs that the FCC "seek to reduce administrative burdens on subscribers, cable operators, franchising authorities and the Commission" and "take into account" certain enumerated factors.[34] These provisions are consistent with the Commission's proposal in this proceeding. Furthermore, Section 623 does not limit the Commission to those enumerated factors. To the contrary, Section 623(a) explicitly expresses a preference for competition.[35]

Other commenters, including RAA and Time Warner, argue that Section 623 actually renders redundant or moot any regulations designed to promote competition in MDUs. First, they argue that MDU residents subject to the de facto monopoly imposed by an ESC need not worry about being charged a higher rate than other subscribers in the same franchise area because Section 623(d) requires cable operators to charge uniform rates throughout a given franchise area.[36] Requiring that rates are uniform, however, is not the same as requiring that rates are reasonable, or that considerations that may be unique to MDUs, or to a particular MDU, be accommodated in other terms and conditions

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33 47 U.S.C. §543(b)(2).

34 *Id.*

35 *See, e.g., Inside Wiring Order,* 13 FCC Rcd at 3704, ¶89.

36 RAA Comments at page 37; Time Warner Comments at page10.

of a service agreement. An MVPD operating exclusively within a particular MDU, for example, may charge uniformly unreasonable rates without the constraint of competition, or may decline to address basic concerns about safety, reliability or construction quality at the MDU complex. Second, RAA and other commenters argue that Section 623(a)(2) eliminates FCC authority to regulate rates in areas subject to "effective competition."[37] Such arguments, however, ignore the fact that Section 623(a)(2) only eliminates rate regulation after the Commission has made a specific determination of effective competition in a particular area.[38] To say that the Commission cannot or should not regulate ESCs because there may be such determination made in some areas in the country is facially flawed if applied to the entire country. Moreover, even in areas in which such a determination has been made, the Commission would still have authority to regulate ESCs pursuant to Section 1, Section 4(i), Section 303(r), Section 601, Section 628, and Section 706.

C. The Commission Has Authority to Regulate MVPDs.

Parties opposing the proposed regulation of ESCs argue at great length that the Commission has no authority to regulate real property owners and any attempt to regulate exclusive contracts between MDU owners and MVPDs therefore is beyond the Commission's authority. Even assuming that these parties are correct in asserting the Commission's limits with respect to real

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[37] *See, e.g.,* RAA Comments at pages 37-38.

[38] Such arguments also ignore the fact that while cable operators may charge non-uniform rates in areas declared subject to effective competition, MDU residents subject to ESCs may not be able to take advantage of such competition, or lower rates that result from competition.

property owners (at least when their activities do not directly implicate concerns within the Commission's purview), the Commission unquestionably has authority to regulate MVPDs, and that is precisely what the Commission proposes to regulate – MVPD actions that restrict the ability of other MVPDs to offer competitive services to a significant number of consumers. Specifically, MVPDs would be barred from entering to, or enforcing, ESCs.

The fact that a regulatory action directed towards MVPDs may have an incidental effect on real property owners does not transform the proposed Commission action into a regulation of real property owners. For example, the Commission is not regulating lenders when it enforces its long-standing policy prohibiting licensees from granting security interests in Commission licenses.[39] That restriction directly and adversely affects the interests of lending institutions doing business with Commission licensees. Nevertheless, the Commission cannot be said to be regulating financial institutions simply because its regulations on Commission licensees affect the interests of such institutions.

As discussed in the AT&T Comments, the courts have recognized that where the Commission is regulating a party properly subject to Commission authority, incidental effects on an unregulated party will not abrogate the Commission's authority to regulate.[40] In *Cable & Wireless P.L.C. v. FCC,* for instance, the D.C. Circuit considered a Commission order prohibiting United States telecommunications companies from paying foreign telecommunications

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39 *See, e.g., Kirk Merkley, Receiver*, 56 RR 2d 413, 416 (1984), *aff'd sub nom. Merkley v. FCC*, 776 F.2d 365 (D.C. Cir. 1985).

40 AT&T Comments at pages 22-23.

companies more than certain benchmark rates for completing international long-distance calls. Despite arguments that the Commission did not have the authority to regulate foreign telecommunications companies, the D.C. Circuit upheld the Commission's order, noting that "the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences."[41]

Likewise, in *Ambassador, Inc. v. U.S.*, the United States Supreme Court upheld Commission-enforced telephone service tariffs that prohibited hotels from charging additional fees on guests using the tariffed telephone service.[42] As aptly stated by AT&T, "*Cable & Wireless* and *Ambassador* thus confirm that the Commission has authority to regulate cable operators' conduct in entering into new exclusive contracts or enforcing exclusivity provisions in existing contracts, even if such regulation may affect the contractual rights of third parties not otherwise such to direct regulation by the Commission."[43]

Nevertheless, RAA asserts that the Commission "no jurisdiction over the real estate industry" and therefore cannot regulate exclusive contracts affecting the real estate industry's interests. In support of this notion, RAA cites *Building Owners and Managers Association International, et al., v. Federal Communications Commission*.[44] RAA, however, utterly misconstrues the import of *BOMA*. Indeed, far from undermining the Commission's authority in this

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41 *Cable & Wireless P.L.C. v. FCC,* 166 F.3d 1223, 1230 (D.C. Cir. 1999).

42 *Ambassador, Inc. v. US*, 325 U.S. 317 (1945).

43 AT&T Comments at page 23.

44 *Building Owners and Managers Association International, et al., v. Federal Communications Commission*, 254 F.3d 89 (D.C. Cir. 2001) ("*BOMA*").

matter, *BOMA* actually supports the Commission's proposed prohibition on exclusive contracts. In seeking review of the Commission's rules generally prohibiting barriers to the use of over-the-air reception devices, the *BOMA* petitioners made essentially the same argument advanced by RAA and certain other commenters in this proceeding – that the Commission could not issue regulations affecting the real estate industry because Communications Act does not "explicitly grant the Commission jurisdiction over the real estate industry, an area that is normally outside of the Commission's scope of authority."[45]

The Court directly rejected that argument. First, the Court noted that through the Communications Act, Congress intended "to confer upon the Commission sweeping authority to regulate …" and that the Commission is "granted 'broad authority' to execute its [statutory] mandate …" including specifically, under Sections 4(i) and 303(r) of the Act.[46] Then, directly rejecting the argument that the Commission has no jurisdiction over the real estate industry and real estate contracts, the Court held that "[w]here the Commission has been instructed by Congress to prohibit restrictions on the provision of a regulated means of communications, it may assert jurisdiction over a party that directly furnishes those restrictions, and, in doing so, the Commission may alter property rights created under State Law."[47] The "parties" in that case were property owners.

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[45] BOMA, 254 F.3d at page 94.

[46] *Id.*

[47] *Id.* at page 96.

RAA apparently recognizes the *BOMA* court's holding, and tries to narrow the scope of the court's ruling by asserting that it is based on the explicit language of Section 207 of the Communications Act.[48] But this approach is of no avail for RAA, as the broad principles of the *BOMA* case cited above directly apply in this proceeding, where (as demonstrated by SureWest and other commenters) the Commission has clear statutory authority to promote competition in the provision of MVPD services, and to limit restrictions on such competition, regardless of their source.

D. Section 706 Supports Commission Action in this Proceeding.

As noted above and in the SureWest Comments, Section 706 of the 1996 Telecomm Act directs the Commission to "encourage the deployment … of advanced telecommunications capability to all Americans."[49] Thus, pursuant to Section 706, the Commission should encourage the development and deployment of new and better advanced services in MDUs and real estate developments by enabling alternative service providers to compete for consumers in those MDUs and developments. Parties opposing regulation of ESCs, however, argue that Section 706 does not provide independent authority for Commission action. NCTA, for instance, asserts that Section 706 "simply 'directs the Commission to use the authority *granted in other* provisions … to

48 RAA Comments at note 84.

49 47 U.S.C. §157(a).

encourage the deployment of advanced services.'"[50] As demonstrated herein, however, the Commission separately has authority under Section 601, Section 623, Section 628 and other provisions of the Communications Act to regulate anti-competitive ESCs. Thus, even assuming that NCTA and other like-minded commenters are correct about Section 706's limited scope, Section 706 clearly supports the pro-competitive actions contemplated by the Commission in this proceeding.

E. The Commission Has Authority to Prohibit Enforcement of Existing Contracts.

As demonstrated in the SureWest Comments, the Commission has the power to modify provisions of private contracts when necessary to serve the public interest.[51] Certain commenters, however, claim that the Commission lacks the authority to prohibit enforcement of existing contracts. As set forth above, the Commission has ample authority to regulate such contracts. Nothing in the statutory sections that provide the basis for Commission authority to regulate such contracts expressly limits that authority to new contracts. As AT&T noted in its discussion of Section 628, once the Commission has determined that exclusive contracts are an "unfair method of competition," they are simply unenforceable – "[n]othing in the statute suggests that otherwise

[50] NCTA Comments at page 7 (citing *In the matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et. al*, 13 FCC Rcd 24011, 24045 (1998)).

[51] SureWest Comments at pages 27-28, *citing Western Union Telegraph Co. v. FCC*, 815 F.2d 1495,1501(D.C. Cir. 1987) (citations omitted).

prohibited 'unfair or deceptive acts or practices' are permissible so long as they predate any determination that they are prohibited by Section 628."[52]

Nevertheless, certain commenters (NTCA, for example) claim that the Commission may only act against existing contracts if such action is "imperatively required" by the authorizing statute.[53] SureWest posits that such action is imperatively required by the Commission's statutory mandates to protect competition, promote advanced services and ensure reasonable rates. As set forth above, there now is ample evidence in the record to establish that exclusive contracts cause real harm to competition and the public interest while benefiting only the parties to such contracts. The *only* way to prevent such harms is to prohibit the enforcement of *all* claims of exclusivity.

Nor does it avail these commenters to claim that such action would constitute an unconstitutional "taking." Prohibiting MVPDs from enforcing or entering into ESCs would not constitute a physical intrusion onto MDU private property. Nor would such action impose on any party's use of its private property to the extent necessary to constitute a "taking" under the Fifth Amendment. Property owners would not be forbidden from entering into contracts with MVPDs, or from setting reasonable conditions on such MVPDs' access to their private property, or from receiving a share of revenues from such MVPDs.

Moreover, the Commission has not proposed that property owners be compelled to enter into agreements with every MVPD desiring to access their property. All that is at issue here is a limited prohibition on contract terms that

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[52] AT&T Comments at pages 17-18.

[53] NCTA Comments at page 14.

foreclose even the possibility of a competitive service provider offering services to a particular MDU or property development. Given the limited burden imposed, the contemplated regulation cannot be deemed a "taking" under the Fifth Amendment.[54]

IV. Conclusion

Fair and open competition results in better prices and services for consumers. Yet, the residents of at least 28 percent, and perhaps as high as 59 percent, of the MDUs passed by the SureWest network are locked into taking service from only one MVPD. The record in this proceeding demonstrates that exclusive service contracts constitute a complete barrier to fair competition and consumer choice of MV and other services in MDUs. The record also demonstrates that these contracts constitute a substantial barrier to investment in and deployment of advanced broadband networks. The Commission has taken steps recently to further encourage competition in the MV service market, and

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[54] Other commenters argue that prohibition of enforcement of existing contracts would improperly disturb the business expectations of the parties to such contracts. Having determined that the Commission has the authority to act and that failure to act would harm the public interest, it is not necessary for the Commission to forebear from acting merely to preserve the expectations of the contracting parties. Action by the Commission here would not offend the constitutional "contract impairment" clause, as that clause applies to action taken by the states. Taking more limited action would merit even less concern about the impacts of Commission action. Thus, to the extent that the Commission sees the need to ameliorate private concerns regarding parties' legitimate expectations with respect to existing contracts, it could achieve its pro-competitive objectives by prohibiting the enforcement of only the exclusivity provisions of existing contracts, while retaining the remaining provisions of such contracts (to the extent that these other terms are not anticompetitive in purpose or effect) and letting competing MVPDs elect either to "opt-in" to the essential of the remaining terms or to negotiate new and independent access arrangements that are not unreasonably burdensome and that would allow individual residents a choice of video provider. *See*, pages 11-12 *supra*.

even in the market as applied to some MDUs, but many residents of MDUs throughout the country cannot reap the benefits of competition because exclusive service contracts bar them from exercising competitive choice. Two months ago, Chairman Martin noted “the Commission’s commitment to ensure that all consumers – including those living in apartment buildings – benefit from competition in the provision of voice and video services.” In order to truly fulfill that commitment to the millions of Americans who live in apartment buildings, other MDUs, and real estate developments, the Commission must prohibit MVPDs from entering into new or enforcing existing exclusive service contracts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul J. Feldman, do hereby certify that a true copy of the *Reply Comments of SureWest Communications* was sent this 1st day of August, 2007 by electronic mail where indicated and via United States First Class Mail, postage prepaid, to the following:

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